Supreme Court, U.S.
FILED
DEC 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-702

In The

Supreme Court of the United States

October Term, 1987

EUGENE DONG, JR., M.D.

Plaintiff and Petitioner,

vs.

THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY, et al.,

Defendants and Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

Insofar as defendant and respondent Zoltan Lucas, M.D. ("Dr. Lucas") is concerned, the issue is whether plaintiff and petitioner Eugene Dong, Jr., M.D. ("Dr. Dong") has a federal Constitutional right to pursue a state common law defamation claim, based upon writings authored by Dr. Lucas which were found to be non-actionable opinion under state common law.

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I. ISSUES PRESENTED FOR REVIEW

Insofar as defendant and respondent Zoltan Lucas, M.D. ("Dr. Lucas") is concerned, the issue is whether plaintiff and petitioner Eugene Dong, Jr., M.D. ("Dr. Dong") has a federal Constitutional right to pursue a state common law defamation claim, based upon writings authored by Dr. Lucas which were found to be non-actionable opinion under state common law.

II. STATEMENT OF THE CASE

(a) Facts: Dr. Dong and Dr. Lucas were members of the faculty of the Stanford University Medical School, the former working in the field of heart transplants, and the latter working in the area of kidney transplants. Beginning in the early 1970's, Dr. Dong aggressively encouraged and pursued various investigations of Dr. Lucas' professional integrity.

In early 1975, at the urging of Dr. Dong, Dr. James Mark (the then acting chair of the Department of Surgery of the Stanford School of Medicine) appointed an *ad hoc* faculty committee (the "Feigen Committee") to look into Dr. Dong's latest charges. On July 24, 1975, Dr. Lucas sent a five page letter to the chair of the committee, which requested investigation of certain charges against Dr. Dong. Those charges, and the factual bases for each of them, were outlined in the letter for the consideration of the members of the committee. While it is true that Dr. Lucas used the phrases "public fraud," "scientific fraud" and "consumer fraud" in that letter, it is also true that he carefully delineated the

factual foundations for his allegations and he repeatedly used cautionary phrases such as "I wish to suggest," "It may reasonably be argued," "I suggest," "I believe" and "I think." Indeed, after using the phrase "public fraud" at one point in the letter, Dr. Lucas stated: "I am not a lawyer and I use the latter terminology *only to make a case* that parallels Dong's letter to the Feigen Committee." (Emphasis added.) The Feigen Committee did not investigate the charges against Dr. Dong.

In 1977, Dean Clayton Rich of the Stanford University School of Medicine appointed another *ad hoc* committee (the "Wilson Committee") to investigate some new charges against Dr. Lucas, which Dr. Dong had originally submitted to the United States Senator Edward Kennedy. On June 6, 1978, Dr. Lucas sent a two page letter to Dean Rich, in which he objected to Dr. Dong's behavior and requested the formation of an extra-departmental peer committee to evaluate Dr. Lucas' charges that Dr. Dong's activities violated good scientific practice and constituted "consumer fraud." Dean Rich thereafter sent Dr. Lucas' charges to the Wilson Committee, which concluded after a brief review of the letter that there was insufficient evidence to pursue them and they were effectively dismissed.

Dr. Lucas was eventually found guilty of misconduct by the Wilson Committee and in February of 1979 Stanford suspended him for 12 weeks without pay and placed him on probation for two years. No action was taken against Dr. Dong.

(b) Proceedings Below: Dr. Dong filed his original Complaint against Dr. Lucas and the other defendants/respondents in the Superior Court of the State of

California, in the County of Santa Clara, on June 5, 1979. A First Amended Complaint was filed on September 17, 1979. Dr. Lucas was named in several causes of action, but in essence Dr. Dong alleged that he was defamed by the 1975 and 1978 letters written by Dr. Lucas.

The action was called for trial in the Santa Clara County Superior Court on November 13, 1984, at which time Dr. Lucas made a motion *in limine* for an evidentiary ruling that the 1975 and 1978 letters should be excluded, on the ground that they were statements of opinion, which are not actionable under California law. The trial court judge granted the motion, ruling that the letters, taken as a whole, were indeed statements of opinion and that they were therefore inadmissible. As a result of that ruling, and the Court's ruling on the *in limine* motions made by the other defendants/respondents, counsel for Dr. Dong conceded that they would be unable to make a *prima facie* case and they offered to stipulate to a non-suit.

Following entry of judgment, Dr. Dong took an appeal to the Sixth Appellate District of the Court of Appeal of the State of California. Following briefing and oral argument, the Court of Appeal affirmed the trial court's rulings and on May 6, 1987, the Court published its opinion in *Dong v. Board of Trustees* (1987) 191 Cal.App.3d 1572.

Dr. Dong's Petition for Reconsideration, filed with the Court of Appeal, was summarily denied, as was his Petition for Review, filed with the Supreme Court of the State of California.

III. ARGUMENT

Dr. Dong's Petition is 43 pages long, and nearly half of it consists of a rambling argument in which he attempts to attack the lower courts' rulings that Dr. Lucas' 1975 and 1978 letters constituted statements of opinion, and not fact. Although Dr. Dong has attempted to frame Constitutional issues, he has actually done nothing more than argue various points of state law, such as: whether the "totality of the circumstances" test (enunciated in *Ollman v. Evans* (1984) 750 F.2d 970 and in *Baker v. Los Angeles Hearld Examiner* (1986) 42 Cal.3d 254) is an appropriate method for making the opinion/fact distinction; whether or not that distinction is to be left to the Court or to the jury; whether the Restatement approach to the opinion/fact distinction is appropriate, or was applied properly in this case; and whether it was appropriate for the trial court to make the opinion/fact distinction by ruling on a motion *in limine*. None of these questions involve First Amendment or any other Constitutional issues. They involve only state common law.

Dr. Dong filed a defamation lawsuit against Dr. Lucas, and that claim was based purely on the common law of the State of California. Dr. Dong's claims against Dr. Lucas were not based on any rights *conferred* by the Constitution of the United States. In defending himself, Dr. Lucas argued that his letters were statements of opinion and were therefore inadmissible. The trial court, and the California Court of Appeal and Supreme Court, agreed and upheld *Dr. Lucas'* claim of constitutional protection.

Dr. Dong, not having raised any Constitutional issues on his own, is now asking this Court to tell the

State of California how to formulate its substantive and procedural common law on defamation, which, it is respectfully submitted, is outside the appropriate scope of review by this Court.

CONCLUSION

Defendant and respondent, ZOLTAN LUCAS, M.D., respectfully requests that the Petition be denied.

DATED: December 1, 1987.

Respectfully submitted,

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